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28 February 1997

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919M Street, N.W.
Room 222
Washington, DC 20554

Re: Jay Lubliner and Deborah Galvin v. Potomac Ridge Homeowners Association, CS Docket No. 96-83
CASE IDENTIFIER CSR-4915-0

Encl: VHS Videotape of Representative Signal Reception in Petitioners' Vicinity Without Exterior Antenna
Results and Implications of a "Plain Meaning" Survey Concerning the Word "Acceptable"

Dear Sir,

I would like to take this opportunity to make further response regarding the subject matter as an individual, interested party, and as a homeowner member of the Potomac Ridge Homeowners Association (PRHOA). I am in an intimately involved position to know and understand firsthand the position, rationale, and intent of PRHOA, which of course, neither the Petitioner or the below-listed commenters share with me. This letter will specifically address several communications made to you regarding the Petition for Declaratory Ruling which is at the core of this case. The communications I will address include those submitted by the following:

That of Robert B. Jacobi, Cohn and Marks, Washington, DC, on behalf of Golden Orange Broadcasting, Inc., Anaheim, CA, dated February 18, 1997;

That of Gary Klein, CEMA, Arlington, VA, dated February 18, 1997;

That of Werner K. Hartenberger, Harrington, Dow, Lohnes & Albertson, Washington, DC, Kurt A. Wimmer, Covington & Burling, Washington, DC, and Wade H. Hargrove, Prak Brooks Pierce Mclendon, Humphrey & Leonard, Raleigh, NC, on behalf of the Network Affiliated Stations Alliance, dated February 18, 1997; and

That of Henry L. Baumann and Barry D. Umansky, NAB, Washington, DC, dated February 18, 1997

I find it necessary to specifically cite and hopefully rectify any representations made in the above that are at deviance with fact or otherwise may mislead or distract in your deliberations related to the specific Petition at hand.

Regarding Mr. Jacobi's written comments, the implication of paragraph 2, which describes the topography of the Los Angeles market area, is not relevant unless he is making an argument that the inability of consumers in **one** geographic location to receive over-the-air broadcast television without an exterior antenna is inseparable from a **universal** "right" to erect an exterior antenna for the same purpose, regardless of those other local conditions. This is, of course, not what the final language of the Telecommunications Act of 1996 says. I believe the Act's actual language is clear in protecting exterior TVBS antennas by exception based on local signal strength, not universally. Thus, all further references to the ability of Los Angeles consumers to receive television station KDOC are irrelevant to the specific Petition in question. My own ability, as a close neighbor of the Petitioners and under the same effects of local conditions, to enjoy all seven (7) locally broadcast networks without an exterior (or attic) antenna *is*, however, relevant. I hereby enclose videotaped programming from all local stations, made in close

proximity to the Petitioners and subject to the same natural and manmade conditions, to support this fact. Once this ability is accepted, along with the fact that there are no cost or delay penalties associated with an interior antenna which provides the same technical capability to enjoy the same quality viewing, all other arguments relative to the Petitioners' request for an exterior TVBS antenna are obviated. This reality, in fact, is the basis of the current interpretation of the Act by Potomac Ridge Homeowners Association (PRHOA) and all of its lawful actions. The position of PRHOA in this specific matter is actually supported by Mr. Jacobi's argument and citation (paragraph 5), because, indeed, reception is **not** "impossible" or "substantially degraded." *These quoted words are those of the Commission's Report and Order, (paragraph 20).* ***(It is clear that this reference places the "substantially degraded" standard adjacent to the "impossible" standard to separate its interpretation from the other end of the "acceptable quality" spectrum,"i.e., the end which represents "unaffected" or "near-optimum" reception.)*** Further in paragraph 5, it is noted that the Petitioners state that they cannot receive an acceptable signal using an attic antenna. Again, to add and clarify, the Petitioners are not required by PRHOA, their homeowners' association, to place a TVBS antenna in the attic, merely to place it indoors. I again respectfully remind the Commission that the Petitioners can in fact receive acceptable quality signals, despite what may be implied by their Petition, unless of course, the laws of physics do indeed somehow experience a discontinuity between the Lubliner/Galvin address and the addresses of their neighbors who live on the same topography in houses of similar design and same construction, a notion inspired by the Commenter. Thus, Mr. Jacobi's assertion that "The enforcement by PRHOA of the covenant in question would impair Petitioner's ability to receive an acceptable off-air programming signal as explicitly defined in the Report and Order" is simply **not factual** by the Commission's own standards and interpretation.

Regarding Mr. Klein's statement of support for the Petitioners, concern seems to be specifically related to 18-inch parabolic antennas used to receive DBS video programming. This concern is completely and entirely outside the issue raised by the subject Case between Lubliner/Galvin and PRHOA. Indeed, PRHOA had ceased enforcing its ban on such dishes even *before* the Act was final. This should clearly demonstrate the willingness and intent of PRHOA to adjust, where necessary, to operate in a compietely lawful manner. Such willingness, however, is in no way synonymous with a more general surrender on related issues which are specifically not protected by the Act, as some commenters seem to require.

Regarding the comments of Messrs. Hartenberger, Wimmer, and Hargrove on behalf of the Network Affiliated Stations Alliance (NASA), again, specific rebuttal is necessary for the Commission to avoid being misled by inaccurate statements of "fact." In their comments, three specific reasons are cited for rejecting PRHOA's views in this case. In describing the first reason, it is stated as fact that the Commission has found that "an impairment occurs" if the signal is "adversely affected," while simultaneously promoting both the "plain meaning" of the word "impair" and the Commission's specific standard offered in the *Reception Devices Order*, which interprets it as "substantially degrade[s] reception." Thus, the first reason uses two distinctly standards, one (the former) not supported by the Act's language or followed by PRHOA and one (the latter) entirely consistent with the Act's language and fully complied with by PRHOA. These two standards are hardly synonymous, by plain meaning or otherwise. Having made a statement which rests on what "the Commission already has determined," these Commenters, still describing their first reason for rejecting the Association's argument, now ignore the Commission's determinations (in the *Reception Devices Order* and the Report and Order) to negate the "acceptable quality" standard. Thus, their first reason must itself be rejected as contradictory and illogical in its citings and conveniently chosen interpretations and standards. In describing their second reason for rejecting the Association's views, the Commenters have gravely misinterpreted a cited document to state as fact that PRHOA's position is that reception of a single acceptable quality signal, as opposed to all local signals, is deemed to be sufficient. That interpretation is untrue, and the Association has never taken such a position. I am *uniquely* qualified to correctly interpret the cited document because ***I* wrote it**. The Commission may rest assured that such a restriction has never been intended or acted upon by PRHOA relative to the Act. Thus, the Commenters' second reason for rejection of the Association's view is, in true and actual fact, **non-existent**. Further, whether or not any given position

would make Section 207 ineffective is, by itself, irrelevant; what is relevant, especially in this case, is whether or not Section 207 is being complied with. Lastly, the third reason offered by these Commenters for rejection of the Association's view is largely a rehash of their first reason, and seems to require that there be no effect on signal by an association's pre-existing restrictions. There is no argument that some, scientifically measurable adverse effect necessarily exists when moving any antenna indoors, however the Association correctly understands that the standard written into Section 207 and interpreted by the Commission in its Report and Order clearly allows such a degrading effect to be permitted as long as a signal of acceptable quality remains available. That is exactly the fact of this case, despite the Petitioners' claims to the contrary, and is fully supported by proof offered the Commission. Therefor, in summary, with all three reasons of these Commenters so clearly rejected (two unsupported by fact or interpretation and one non-existent), it would appear that NASA makes no legitimate argument that PRHOA is in violation of the Act. Indeed, the "stretching" of the Act's provisions and actual language would entirely seem to be on the part of the Petitioners and their supporting commenters.

Finally, with respect to the comments of Messrs. Baumann and Umansky of the NAB, an argument is made early on that the new regulations "aimed generally at preempting governmental and private restrictions on the ability of a television viewer to employ outdoor receiving antennas to pick up, *inter alia*, television programming from over-the-air broadcast stations..." If the Act itself carries any weight, the general aim, ***as enacted***, is not to establish antenna "rights" *per se*, but to establish universal access (an interpretation supported by these Commenters on page 5 of their Comments) to signals of acceptable quality, access not encumbered with unreasonable cost or delay. It is this capability, not *necessarily* an antenna itself, that is being protected. This manifests itself clearly in the Act's *limited* protection of dish antennas, a protection which exists **only** for small dish antennas, as one example. The NAB comments establish concern over "the likelihood of homeowners associations and the like misinterpreting or ignoring the terms of the Act and the FCC's rules in an effort to maintain the kinds of antenna restrictions for which the Act's Section 207 and the implementing FCC rules were designed to preempt." Despite what these Commenters choose to believe (and assume), "That is precisely **[not]** what we have here." Homeowners associations, I, "and the like," however, have concerns over the willingness of the *telecommunications industry* to subjugate *themselves* to (and not misinterpret or ignore) the Act and the rules *as written*, and not simply presume that the Act and rules should be interpreted in a manner that reflects the way that the industry might have preferred the Act to have been writtten, as the arguments of these Commenters so "brazenly" demonstate. To me, the Act, and the rules, are extremely clear in protecting *reasonable access*, not unnecessary hardware. I tend to agree with these Commenters that there is "misrepresentation" involved here (see previous comments about demonstrable signal quality in the geographic locality of the Petitioners), and I, too, am feeling quite "bullied" by some interested parties (these Commenters more than any others to date) whose entire positions ultimately rest on the all-too-easily-accepted premise that a Petitioner's statement that he is incapable of receiving acceptable quality signals without an exterior antenna is an absolute given. It is certainly **not** a given. Again, I remind the Commission that, in this specific case, the burden of proof against the Petitioners' statement regarding signal quality is fully met by the affirmations of the Association and the Petitioners' neighbors, including me. I again invite the Commission's attention to the videotaped broadcasts from all seven (7) locally-broadcasting networks, provided as an enclosure, which are representative of television reception within the PRHOA's area of governance. With such reception under the preexisting restrictions, the Petitioners' argument and those of supporting commenters are without basis relative to the Act. Nonetheless, these Commenters choose to rail their vindictives while ignoring the purely technical applicability in this specific case. The Petitioners did indeed focus "on the salient elements of the current regulations -- unreasonable delays, imposition of unreasonable costs and the preclusion of acceptable quality signal reception." So have PRHOA, the difference being that simply referring to those salient elements does not establish the legitimacy, credibility, or veracity of one position or the other. There is no demonstrated "invalidity" of PRHOA's position to be "acknowledged." There is no "unreasonable delay" other than the delay of the Petitioners and supporting commenters to acknowledge that "access" to "acceptable quality signals," without "unreasonable delay" or "unreasonable cost" is **fully available** to the Petitioners **without** an exterior TVBS antenna. The same clarification regarding "just *one* over-the-air signal" needs to be

made with these Commenters as with a previous one in this letter, because such a theory *is* "truly remarkable" as these Commenters note. It is so remarkable in fact that it never occurred to PRHOA, only to commenters from the telecommunications industry, who seem quite ready to change the non-specific "a" to the very specific "one." Such an interpretation is, of course, in error, and never reflected the position of the Association as has already been stated. Further, the contention that there exists an "unlawful 'flat ban'" is grossly inaccurate in that restrictions are not necessarily preempted if acceptable quality signals are available. However, this flawed assertion by these Commenters references, in a footnote, a September 11, 1996 document purported to state PRHOA's position is that "residents may only place an over-the-air television reception antenna in the attic of the home..." As I examine and reexamine the cited document, it is abundantly clear that no such statement exists in it; what is not clear, however, is whether it was these specific Commenters, or the Petitioners, or someone else who seem to have fabricated this "fact." The PRHOA response to the Petition is quite clear in **not requiring attic installation** of TVBS antennas in Potomac Ridge. Further regarding the accusation of a "flat ban" in Potomac Ridge, there has already been discussion among PRHOA's Board of Directors of erecting a large, outdoor TVBS antenna on community property to assure residents of the townhouse units of receiving an acceptable signal from all seven (that's ***seven***, and not ***one***) locally-broadcasting networks. (Townhouses are constructed with masonry firewalls between units which compromise over-the-air broadcast signals in a way not affecting the Petitioners or other residents in single-family dwelling.) As with all other decisions affecting Potomac Ridge and the Act, such an undertaking is contemplated with the absolute intent of strictly complying with the law while maintaining, as much as possible, the aesthetics of the resident's homes, a consideration mandated by every homeowner's voluntary acceptance of our legally binding restrictions, restrictions which run inseparably with the land and are undoubtedly part of the land's value. Whether or not PRHOA erroneously (or otherwise) stated that there existed a height restriction on the Petitioners' TVBS antenna, the fact that the antenna in question was within height (i.e., "safety") restrictions does not serve to make it a "protected" antenna, as the commenters seem to imply. It merely prevents its restriction for safety reasons. Of course, a "safe" antenna must still meet the *real* qualifications for Protection under the Act, that is **first and foremost** (*once again*), its technical necessity for the reception of an acceptable quality signal, a qualification without which *no* antenna is protected. No waiver by the Association is necessary under these circumstances; indeed waivers being reserved for "local concerns of a highly specialized or unusual nature" (the actual language). Thus, the Commenters' suggestion to the Commission that associations bear the burden of seeking a waiver in the case of individual disputes is patently misleading, if not calculated. Because the Petitioners are able to receive local signals of acceptable quality using an interior antenna which incurs no delay or additional cost, PRHOA's actions are fully within the provisions of the Act, and they cannot therefor be required to seek a waiver.

I further invite the Commission's attention to the enclosed survey regarding the subjective meaning of the word "acceptable" as evidence of its reasonable interpretation.

Sadly, it would appear that there is an overwhelming willingness on the part of the Petitioners' supporters to accept as unquestioned fact that they cannot receive an acceptable quality signal if PRHOA's covenant is enforced against TVBS antennas. Again, the evidence provided by myself, the Association, and the Petitioners' neighbors prove otherwise. Will any of the Petitioner's supporters limit their statements of "fact" in this regard to that which is actually known? Is the mere prospect of selling a few more rooftop antennas in Potomac Ridge (because signal access is not the real issue here) so scintillating that the validity of a fully-compliant argument must be sacrificed to an assumption and/or extrapolation of self-serving convenience? With 391 other households on 109 flat acres, how can the Petitioners be the only ones who seem to find it necessary to install an exterior TVBS antenna to have access to local broadcast channels? The answer lies in his September 19 1996 communication to PRHOA, in which he declares that the exterior antenna is required "to satisfy my needs" and "for my interests, " in an obvious counterpoint to what might be generally necessary for other local residents. Indeed, his interests seem to extend well beyond reasonable access to local TV reception to include such specifically appropriate

possibilities as amateur radio operation and a prohibited home business related to TV antenna installations.

As a homeowner and a taxpayer, I am increasingly shocked by the obviously large role that certain entities play, not as citizens, but as special interests, in the shaping and execution of public policy. Their sometimes incredible willingness to distract, obfuscate, impugn, and malign at times appears to be boundless and only serves to bring general contempt upon their motives and methods. This reflects poorly on us all, those who actually participate, and those of us who simply allow it to continue. My home is my thin, hard-earned slice of the American pie. I simply do not accept any unnecessary, and unfounded-in-law assault on my ability, and that of my neighbors, to exercise our property rights, to the greatest extent possible under the law, in living in a manner to which we all voluntarily subscribed, especially to promote an extremely limited benefit to one, or a few, Potomac Ridge residents, a benefit which I firmly believe is so insubstantial as to fall clearly outside the protections of the Act.

I herewith reaffirm my position that I view the Commission's handling of the Petition affecting Potomac Ridge to be an absolute test of its willingness to objectively apply the Act in strict accordance with its existing language, and with regard only to the facts of this specific case. Again, to do otherwise would conclusively demonstrate an obvious, shameless lack of professional and ethical consideration in the execution of its responsibilities by the Commission.

Thank you again for your kind attention.

Respectfully,

H. A. Lapa, Jr.

cc: Jay Lubliner
Deborah Galvin
PRHOA
CAI

RESULTS AND IMPLICATIONS OF A "PLAIN MEANING" SURVEY
CONCERNING THE WORD "ACCEPTABLE"

Last week, I sent an e-mail survey to the subscribers of two internet lists. The lists are unrelated to legal or telecommunications issues, and no context was provided. The survey consisted of a single query such as might be found in a standardized literacy or intelligence test. It was:

> The word "acceptable" is closest in meaning to --
> a. perfect
> b. excellent
> c. good enough
> d. bad

Fifty-four (54) responses were received, enough to make the survey statistically significant. Fifty-three (53) chose "c. good enough" as the correct answer, and one (1) declined to issue a response without further information. These responses came from English-speaking people in the United States as well as Australia, Germany, South Africa, Canada, and the United Kingdom. I believe these people chose the intelligent, literate, indeed, the only defensible, answer.

The obvious implication is that the Commission's standard of "acceptable quality signal" does NOT equate to "unaffected" (i.e., perfect) or even "slightly affected" (i.e., excellent) as has been suggested by telecom industry commenters, especially using the "plain meaning" criterion. Rather, there was little confusion, despite obvious subjectivity, that "acceptable" meant only a general adequacy for intended purpose, an understanding specifically noted by a number of survey respondents, and a truly disinterested and unbiased conclusion that reinforces the *Commission's Reception Device Order* and Report and Order as well as the position of PRHOA.

Despite what one set of telecom industry commenters wrote to the Commission, the entire spectrum of possible signal quality can indeed be broken into "acceptable" and "unacceptable" with no further categorization being necessary to describe other, unincluded possibilities. Thus, enforcement of any restriction is entirely lawful unless the consumer has "unacceptable signal quality." As soon as an unacceptable signal signal improves beyond unacceptable, without unreasonable cost or delay, the Act is complied with. Petitioners with signal quality better than merely acceptable are thus well removed from the Act's specific protections.